

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

AMAZON.COM SERVICES LLC,)	
)	
)	
Employer,)	
)	
and)	Case No. 10-RC-269250
)	
RETAIL, WHOLESALE AND)	
DEPARTMENT STORE UNION,)	
)	
Petitioner.)	
)	

**EMPLOYER’S BRIEF IN SUPPORT OF ITS EXCEPTIONS
TO THE HEARING OFFICER’S REPORT ON OBJECTIONS**

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I. INTRODUCTION

After a long and arduous campaign, Petitioner Retail, Wholesale and Department Store Union lost this election by **over 1,000 votes**. But instead of accepting the will of the voters, the Union filed nearly two dozen objections raising as many challenges as the Union could think up. The Hearing Officer conducted a 12-day hearing and, in the end, the Union abandoned or the Hearing Officer recommended dismissing nearly all the Union's objections. But the Hearing Officer nevertheless recommends a second election for two main reasons: first, Amazon requested, and the U.S. Postal Service ("USPS") agreed to, the installation of a nondescript, general-purpose USPS mailbox in front of the entrance of the BHM1 fulfillment center to give employees the option of depositing their completed mail ballots in a secure and convenient location, surrounded by a tent that prevented anyone from seeing anyone else mail a ballot; and, second, before the seven-week voting period started, Amazon made "vote no" pins and car tags available to employees on tables at the back of the room where meetings about the union campaign occurred. Neither point provides any basis for ordering a second election, particularly when the first election was as much of a "landslide"—to use the Hearing Officer's word, Report 24¹—as the election here.

Under well-settled law, the Board will not lightly set an election aside, and the Union's burden in convincing the Board to do so is a heavy one. Critically, the Union must show that objectionable conduct could "reasonably have affected the results of the election." *Safeway, Inc.*, 338 NLRB 525, 525–26 (2002). But here there is no evidence that the mailbox or availability of "vote no" materials affected voters' actions at all, let alone the results of the whole

¹ References to the Hearing Officer's Report on Objections ("Report") are in the form of "Report __," references to the hearing transcript are in the form of "Tr. __," references to Board Exhibits are in the form of "Ex. B-__," references to Joint Exhibits are in the form of "Ex. J-__," references to Employer Exhibits are in the form of "Ex. E-__," and references to Union Exhibits are in the form of "Ex. U-__."

election. Nor does it make sense to attribute the Union's lopsided loss to either the presence of the USPS mailbox or the availability of the "vote no" materials.

With the mailbox, for example, it is undisputed that Amazon did not set up a mock NLRB polling location, did not surveil any employee who chose to use the mailbox (or even have the ability to do so given the tent), did not campaign at the mailbox, did not harvest ballots at the mailbox, and did not otherwise have any ability to control or access the mailbox contents. In fact, the Hearing Officer found that Amazon's intent was to "provid[e] associates a convenient location to mail in their ballots," to make it "as easy as possible for employees to vote by mail, and to encourage as high a turnout as possible." Report 11–13 (emphasis omitted). And that is not only how Amazon explained the mailbox to employees; it is also what the mailbox and opaque surrounding tent did. They gave all employees, regardless of whether they were against the Union or for it, a **secure** USPS box to deposit their mail ballots without observation and without having to make a special trip to a post office or other USPS mailbox location. The Hearing Officer rightly rejected the Union's conspiracy-theory efforts to sow doubt about the security of the mailbox. As she recognized, "[n]o evidence was presented that established that any entity, other than the USPS, had actual control over the contents of the outgoing mailbox." Report 18. So there is no valid argument that the mailbox led to manipulated or uncounted votes. And there is no evidence that any fixed, preexisting Amazon security camera could see inside the mailbox. No objectively reasonable employee could have formed the view that a camera could see him or her mail a ballot (or anything else), much less what the ballot indicated inside two sealed envelopes.

Yet the Hearing Officer recommended a rerun on the theory that this additional and optional USPS mailbox displaced the Board's "control" over elections and might, oddly, have

decreased voter turnout. Report 24. But just as there is “[n]o evidence” that the mailbox was less than completely secure, neither is there evidence that the mailbox somehow kept voters from mailing in their votes from this or other mailboxes. The Hearing Officer simply speculated that “there is, at the very least, the possibility that the Employer’s misconduct influenced some of the[] 2,000 eligible voters” who did not cast a vote. Report 24. But the Hearing Officer nowhere explained why an employee—even an employee who assumed that the USPS mailbox was under surveillance—would not simply use one of the other 200 USPS mailboxes in the Bessemer area, or one of thousands of other mail-collection locations, rather than not vote at all.

The speculation is underscored by the Report’s lack of any numerical analysis of the votes. Not even the Hearing Officer was willing to state that, without the mailbox, enough of these 2,000 non-voters would have voted for the Union to make up its huge margin of defeat. The final ballot tally showed that, of the approximately 5,867 eligible voters, 738 votes were cast for and 1,798 votes were cast against the Union, with 505 challenged ballots. Report 3. Even assuming, unrealistically, that all 505 challenged ballots were valid votes for the Union, the Union still would have faced a 555-vote deficit. For the mailbox to have affected the election results, then, one must imagine that, but-for the mailbox, the Union would have netted over 555 additional votes out of roughly 2,000 potential additional voters. This is fantasy in an election where the Union’s entire unchallenged vote count was 738 and the unchallenged “no” votes were over 2.4 times as many. There is no evidence or objective basis to conclude that the mailbox had **any effect** on the turnout or the tally, much less a potentially dispositive one.

Rather than indulge such speculation, the Region should credit the obvious alternative explanation. As the Board has already made clear, and as Amazon argued before the election, mail-ballot elections predictably see significantly lower turnout than manual elections. *Aspirus*

Keweenaw, 370 NLRB No. 45, slip op. at 2 (2020). That, expectedly and as Amazon predicted, is just what happened here. The Region should reject the Hearing Officer’s unsupported hypothesis that the mailbox could have led to dramatically fewer pro-Union ballots.

Because there is no plausible causal account of how the mailbox could actually have caused the Union’s resounding defeat, the Hearing Officer stressed a variety of irrelevant factual points—many of which voters had **no way of knowing**—to paint the mailbox in a sinister light. She also implausibly interpreted the Region’s Decision and Direction of Election (“D&DE”) and Board precedent to suggest that the mailbox was forbidden. While the D&DE did impliedly reject, without explanation, Amazon’s original proposal for an **NLRB-controlled ballot drop box** at the BHM1 facility, it never prohibited installing a **general-purpose, USPS-serviced mailbox**, as the Hearing Officer conceded. Report 25. That was not a proposal that Amazon made to the Board. Nor should it have, because the USPS, not the NLRB, is the agency that regulates mailboxes on private property. And because the D&DE gave no explanation for rejecting even the NLRB-controlled ballot drop box, it articulated no reasoning from which Amazon could reasonably have extrapolated that a USPS mailbox would void the entire election. Board precedent does not support that conclusion, either. Indeed, the Hearing Officer acknowledged that this “is a question of first impression.” Report 18. So she resorted to strained analogies to cases that are widely off point.

The availability of small “vote no” pins and hanging car tags likewise does not support a rerun. The record shows that Amazon made no effort to monitor who may or may not have been taking pins or rearview mirror tags as they left small group meetings before the voting period even opened. More than that, the Hearing Officer admitted that Amazon had no plausible way to “actually track which employees took the ‘vote no’ paraphernalia.” Report 41. But even though

Amazon did not and could not track its 6,000 employees' actions with these "vote no" items, the Hearing Officer thought employees might perceive that their employer was trying to discern whether they supported the Union because Amazon representatives gave presentations to employees before employees passed by the table as they exited. But there is no basis for that conclusion. No employee testified that he or she thought Amazon was keeping tabs on how he or she responded to these optional items or that he or she was under pressure to accept them. On the contrary, most employees testified that they did not even know the employee relations ("ER") and human resources ("HR") personnel at these meetings, as those personnel often had come in from other Amazon facilities and ostensibly did not know the employees by name, either. And the strict, six-foot social distancing and masking requirements in effect in January and early February 2021 further reduced the potential, theoretical observation of employees passing by the table. This record is worlds away from the precedent that the Hearing Officer cited, where employees were actually under pressure to accept or reject antiunion paraphernalia while being watched by supervisors who knew them, where the giveaways were much closer to the election, and/or where the election results were much closer. The Region should therefore overrule this objection, too, or at a minimum find that this de minimis objection does not justify re-doing an election involving 6,000 employees.

If the Region orders a new election anyway, it should at least take steps to prevent any issues in the next election based on the absence of directives or guidance to the parties.

For starters, the Region should order that any rerun election take place in person by manual ballot. The Hearing Officer based her recommendation in large part on the low voter turnout, which was lower than the average for mid-pandemic mail-in elections (72.4%) and lower even than the pre-pandemic average (55%). *Aspirus*, 370 NLRB No. 45, slip op. at 2. Amazon

argued to the Region before this election that a mail-ballot election could disenfranchise thousands of employees, and that is what happened. It is virtually certain to happen again if the Region decides to simply repeat the same procedures—although this time perhaps **without** employees having the option to securely mail their votes at the location where they work.

To that point, if the Region orders a second mail-ballot election despite the turnout in the first election, it should provide express and clear guidance on precisely what Amazon is supposed to do with the USPS mailbox. Employees by now have grown used to the mailbox, which has stood, bolted to concrete, outside BHM1 for the past half year. And mailboxes, of course, are regulated by the USPS and federal statutes that generally prohibit their obstruction or destruction. Does the Region nonetheless want Amazon to block access to the existing mailbox during voting? Should Amazon tear it down? Is it enough that Amazon asks the USPS to do one of those things? What if the USPS refuses? The Board has never regulated mail collection or distribution. And so, if mailboxes on employer property now threaten election integrity, questions like the ones listed above need firm answers to ensure that mail-ballot elections, including any future election here, occur under conditions that the Board accepts as fair.

II. STATEMENT OF THE CASE

A. Procedural History.

On November 20, 2020, the Union petitioned to represent certain employees at Amazon's BHM1 fulfillment center. Region 10 Hearing Officer Kerstin Meyers conducted a pre-election hearing by video from December 18 to December 22, 2020, and the parties filed post-hearing briefs on January 7, 2021. Amazon argued that, if the Regional Director directed an election, it should be a manual election, not a mail-ballot election. Ex. J-4. Amazon's brief also proposed certain protocols to enable the Region to conduct a manual election safely despite the COVID-19 pandemic. Ex. J-4 at 28–29, 85–94, 114, 125. Those protocols included, among others, the use

of pass-through boxes for manual ballots and “vending-style distribution” of manual ballots that minimized any risk of surface transmission of the virus on the manual ballots. *Id.* Alternatively, Amazon proposed, among many other things, that if the Board were to direct a mail-ballot election, the Board install an NLRB-controlled ballot drop box at BHM1 to encourage voter turnout. Ex. J-4 at 75–76.

On January 15, 2021, the Regional Director issued a D&DE directing a mail-ballot election conducted through the United States mail. Ex. J-1. In rejecting Amazon’s proposal for a manual election, the D&DE stated:

[T]he use of the Employer’s digital “Distance Assistant” or human social distancing team to monitor the line leading to the voting tent would give the impression of surveillance or tracking. The use of equipment clearly belonging to the Employer, such as pass-through boxes or vending machines, likewise implies a problematic amount of Employer involvement in election proceedings.

Ex. J-1 at 9. The D&DE did not address or respond to any of Amazon’s proposals for a mail-ballot election, including Amazon’s suggestion of a Board-controlled ballot drop box. The D&DE also mentioned nothing about USPS-owned mailboxes that, by definition, were not “clearly belonging to the Employer.” The D&DE required that the mail ballots be mailed to the eligible voters on February 8, 2021 and that ballots be received by the Regional office by March 29, 2021. Ex. J-1 at 10.

The ballots were counted between March 30, 2021 and April 9, 2021. Out of approximately 5,867 eligible voters, 1,798 voters cast ballots against representation by the Union and only 738 cast ballots for representation by the Union. Ex. B-1(a). The parties challenged a total of 505 ballots. *Id.* On April 16, 2021, the Union filed 23 objections to conduct allegedly affecting the results of the election. Ex. B-1(b). The Regional Director set 22 of the 23 objections for a hearing. Exs. B-1(f), B-1(j). That hearing took place by videoconference before Hearing Officer Meyers over the course of 12 days between May 7, 2021 to May 26, 2021.

After the hearing, the Union requested to withdraw six of its objections.² The parties filed post-hearing briefs on June 11, 2021.

B. Relevant Factual Background.

1. The USPS Installed the Mailbox at Amazon's Request and Maintained Exclusive Access to the Outgoing Mail Compartment.

In late December 2020, the USPS received a request from Amazon to install a mail-collection point at BHM1. Tr. 930 (Jay Smith). A few weeks later, an Amazon representative emailed the USPS to confirm that Amazon wanted to move forward with putting a collection box at BHM1. Tr. 931 (Jay Smith). At the time, there was no USPS mailbox at or in close proximity to the BHM1 facility. The USPS initially approved the installation of a standard, blue USPS mailbox, but later the USPS stated that it would have to install a cluster box unit ("CBU") instead. Tr. 864, 867 (Jay Smith). The USPS chose an old CBU from its existing inventory, which it modified to accommodate an increased amount of outgoing mail. Tr. 874 (Jay Smith).

On February 3, 2021, a USPS representative visited the facility and met with Amazon's Procurement Operations Analyst at BHM1. Tr. 976 (Harris). The USPS representative determined where the USPS would install the mailbox. Tr. 978 (Harris). After installing the mailbox on February 4, 2021, the USPS provided Amazon two identical keys that open only incoming mailbox compartment #1. Tr. 985–86 (Harris). The USPS never gave Amazon the key to the outgoing mail compartment, which was labeled "1P." Tr. 988 (Harris), 909–11 (Jay Smith). The modified outgoing mail compartment contained a lock accessible only by the USPS and only by using an arrow key. Tr. 855, 866, 909 (Jay Smith); Tr. 1409 (Rhoten-Coleman). The mailbox was then available for anyone to drop off any kind of mail, not just mail ballots. Tr.

² Should the Regional Director not grant the requested withdrawal of one or more of these exceptions for any reason, Amazon requests the opportunity to brief the merits of the exception(s) so that the Region affords Amazon due process and fairness in this matter.

879 (Jay Smith). The mailbox still operates that way today. *Id.*; Tr. 1813 (Thompson).

The USPS retained control over the keys to the unit, and Amazon had no key and no access to the outgoing mail compartment. Tr. 908–10 (Jay Smith); Tr. 988–89, 993–94 (Harris); Tr. 1406–11 (Rhoten-Coleman). It had access only to incoming mail delivered to incoming mail compartment #1. Tr. 987–89 (Harris). Indeed, Tanula Rhoten-Coleman, the USPS Safety Manager for Alabama and Officer in Charge for Bessemer, Alabama through the month of February 2021 (the mailbox was installed on February 4, 2021), agreed that the “BHM1 parking lot mailbox is as secure as any United States Postal Service mailbox in the Bessemer area.” Tr. 1414 (Rhoten-Coleman). Given this testimony, the Hearing Officer ultimately concluded that “[c]redible evidence failed to establish that anyone aside from the USPS had access to the outgoing mail, or that the CBU was compromised in any way.” Report 27.

The Hearing Officer implied that employees did not know that this was a USPS mailbox. Report 1, 27. But in addition to the fact that the USPS installed the mailbox during the day in public view, around lunchtime, Tr. 981–82 (Harris), Amazon repeatedly made clear in communications to employees that the USPS had performed the installation. Exs. E-1, E-2, E-3, E-4. Numerous employee witnesses recalled receiving these communications. Tr. 145–46, 153 (Richardson); Tr. 359–61 (Wallace); Tr. 424–25 (Bibbs); Tr. 474–75 (Pendleton); Tr. 831–32 (Jackson). Also, as the Hearing Officer acknowledged, Report 18, a USPS letter carrier delivered and picked up the mail in a USPS-branded mail truck six days a week. Tr. 1423, 1432 (Rhoten-Coleman); *see also* Tr. 880 (Jay Smith). And even standing alone, the mailbox looked like an ordinary multi-box unit that the USPS commonly services around the country. Ex. E-5.

2. An Opaque Tent Around the Mailbox Ensured the Privacy of Those Using the Mailbox.

Soon after the installation of the USPS mailbox in February 2021, an ER representative

noted that some of BHM1's existing security cameras faced the mailbox, so Amazon put up a tent around the USPS mailbox to ensure the anonymity of anyone using the mailbox and avoid even the appearance of surveillance. Tr. 1005 (Harris). The cameras predated the mailbox. Tr. 1202 (Street). Amazon has not installed any new cameras on the front of the building since March 2020, nor did it move or redirect any cameras during the critical period. Tr. 1202, 1279 (Street). After the mailbox was installed, BHM1's Loss Prevention ("LP") Manager, Robert Street, directed the LP and Allied Security teams to not use any of the cameras capturing the tent unless specifically authorized to do so. Between February 8 and March 29, there was no reason to use those cameras or save footage from those cameras. Tr. 1221–23 (Street).

In describing the distance between the mailbox and the building with its cameras, the Hearing Officer made a critical mistake, stating that the mailbox was "less than 50 feet" from the facility and "immediately beneath the visible surveillance cameras mounted on the Employer's main entrance." Report 1–2. In fact, it was undisputed that the USPS mailbox sits about **135 feet** from the front of the facility, as the Hearing Officer elsewhere noted, and **127 feet** from the closest of the cameras on the exterior of the facility (which are not the cameras over the main entrance, either). Report 16; Tr. 1210, 1213 (Street); Ex. E-48. The cameras lack the ability to pan or tilt—their view is fixed. Tr. 1202–03 (Street). They do have the ability to zoom, but the picture becomes pixelated and blurry. Tr. 1203 (Street); Ex. E-50. Any camera footage captured remains accessible only for 14 days. Tr. 1203 (Street). A typical person would have no way of discerning which way a camera is facing or what a camera is doing because the camera is covered by a tinted mount/globe. Tr. 1203 (Street); Ex. E-43.

After Amazon put up the privacy tent, none of the facility's cameras could see inside, where an employee would actually need to take out the mail ballot envelope and deposit it. Tr.

1211 (Street). The tent covered the mailbox on three sides, and the only opening faced toward the parking lot, away from the building and cameras. Tr. 1210–11 (Street). The mailbox was recessed deeply inside the tent. Ex. E-42. There were no cameras in the parking lot, as was evident from the evidence, including pictures of the parking lot light poles, which showed that the poles had no attachments remotely resembling the “gray globes” of the security cameras. Tr. 1204 (Street); Exs. E-45, E-46, E-47, E-53.

No LP specialist or security officer was stationed at or near the mailbox. Tr. 1223–24 (Street). After the tent was installed, moreover, Amazon explicitly instructed managers not to use the tent or go near the tent. Tr. 1225 (Street); Ex. E-40. For a period of time (left unproven by the Union), a sign or a banner hung on the outside of the tent. The sign on the tent encouraged employees to “speak for yourself” and to “mail your ballot here.” Ex. E-6.

3. During the Campaign, Amazon Made Clear to Employees That the Mailbox Was Just One Option for Mailing Their Ballots.

No Amazon manager, supervisor, or agent pressured, coerced, or solicited employees to use the USPS mailbox outside the facility to mail their ballots. Tr. 1123–24 (Logan). Employees had the option to use the mailbox, or not, throughout the election period, as reflected by the fact that, of the 17 employees who testified, **not one** stated that he or she actually used the mailbox during the election. No employee was ever disciplined or threatened for using or not using the USPS mailbox outside of the BHM1 facility. Tr. 142 (Richardson).

Even the Union’s witnesses agreed that using the mailbox was simply “an option.” Tr. 476 (Pendleton). It was “somewhere that you can vote if you felt like you did not have a place to vote, or you didn’t know where to vote,” Tr. 283 (Ashford), “don’t have time to go to the post office,” or “live in an apartment,” such that it is “hard to mail mail.” Tr. 476 (Pendleton). The mailbox was there “to make it convenient for people” to return their ballots. Tr. 734–35, 739

(Woods). Employees were not required to use the mailbox, and many did not use it. Tr. 141–45 (Richardson); Tr. 459, 476 (Pendleton); Tr. 747 (Woods).

Amazon also told employees that the mailbox was secure and that only the USPS had access to outgoing mail, including any ballots that employees chose to deposit into the outgoing mail slot. Tr. 865–66, 908–10, 952–53 (Jay Smith); Tr. 987–89, 993–94 (Harris); Tr. 1406–11, 1413–15, 1430–32 (Rhoten-Coleman). Numerous witnesses acknowledged that employees received a text message from Amazon informing them that the USPS had installed a secure mailbox outside the facility’s entrance, that “[o]nly the USPS has the key to access the outgoing mail,” and that they could find their “closest post office or secure mailbox” by clicking a provided link to a USPS website. Tr. 145–46, 149–50, 153–54 (Richardson); Tr. 361–62 (Wallace); Tr. 424–25 (Bibbs); Tr. 474–75 (Pendleton); Tr. 831–32 (Jackson); Ex. E-1. While Amazon appropriately recommended the use of a secure USPS mailbox as a general matter, it did not tell employees that they had to use the USPS mailbox outside BHM1 or that it was the **only** secure mailbox around. Tr. 149 (Richardson); Tr. 240 (Bates); Tr. 476 (Pendleton); Tr. 747 (Woods); Ex. E-3; Ex. U-7. On the contrary, Amazon “wanted [employees] to be aware of all the options to securely mail their ballot,” Tr. 1121 (Logan), and that is why its text message notified employees, by linking to the USPS website, that there were many locations where they could mail their ballots. Tr. 361 (Wallace); Tr. 1120–22 (Logan); Exs. E-1, E-77, U-7.

Nor did Amazon try to limit access to the mailbox (or any mailbox) based on how employees were going to vote: an employee could use the mailbox regardless of how he or she voted. Tr. 240 (Bates); Tr. 1123 (Logan). An employee also could use the mailbox to mail any piece of personal mail. Tr. 878–79 (Jay Smith); Tr. 1334–35 (Street). “The company did not monitor the USPS box there to see whether [employees] were voting or not,” “did not maintain a

list of any kind” about who used the mailbox, and did not even have the means to do so had it wanted. Tr. 1123 (Logan).

4. Both Parties Vigorously Campaigned and Communicated Their Messages to the Voters.

The Union’s campaign began well before Amazon’s campaign and ran for about five months. From October 20, 2020 to March 29, 2021, the Union stationed organizers at the BHM1 entrances and exits. Tr. 555–56 (Brewer). The Union handed out leaflets and collected authorization cards outside the facility. It also posted signs and other banners around Powder Plant Road with campaign messages, such as “Vote Yes” and “Stronger Together.” Tr. 686 (Brewer). On January 20, 2021, the Union received the voter list with emails, phone numbers, and home addresses for all eligible voters. Tr. 659 (Brewer). The Union also used other methods to campaign, including texting, emailing, and traditional mailing. Tr. 659–62 (Brewer). It held small group meetings with employees throughout the campaign and used Zoom and other video formats as well. Tr. 664 (Brewer). And it communicated through social media (for example, Facebook, Twitter, and Instagram), held rallies, and participated in media interviews. Tr. 594, 700–01 (Brewer). The communications addressed such issues as dues, collective bargaining, and strikes. One of the Union’s messages was a guarantee that there would be “no loss of wages or benefits as a result of voting for the union.” Tr. 168 (Richardson); Tr. 1159 (Logan); Ex. E-7. In addition, the Union broadcast messages of support from high-profile political figures, celebrities, and athletes, including President Biden; Senator Bernie Sanders; Representatives Andy Levin, Cory Bush, Terri Sewell, and Jamaal Bowman; Danny Glover; Tina Fey; and rap star “Killer Mike.” Tr. 1127 (Logan).

Amazon ran a two-phase campaign in response to the Union’s campaign and messaging. Phase 1 of the campaign began on January 10, 2021 and lasted four weeks through February 6,

two days before the ballots were mailed. During Phase 1, Amazon's Mini-Campaign Owners ("MCOs") led small group meetings with employees and provided facts about the Union and unionization and offered Amazon's position on those issues. Tr. 1030–32 (Logan). Amazon highlighted a different "theme" during each of the four weeks. Tr. 1051 (Logan).

Amazon instructed the MCOs and consultants on how to engage with employees. Tr. 1033–34 (Logan). Amazon informed them that their purpose was to provide information to employees and articulate Amazon's position. Amazon instructed the MCOs and consultants not to issue their own, unapproved communications to employees. Tr. 1034 (Logan). Overall, Amazon held hundreds of small group meetings, each attended by 15 to 25 employees and lasting about 30 minutes. Tr. 1154 (Logan).

Phase 2 of the campaign (the "Get Out The Vote" phase) began on February 8, 2021. During Phase 2, Amazon used MCOs/consultants to engage employees one-on-one about the voting process, to encourage voting, to deliver Amazon's message regarding the Union's campaign, and to note whether employees had raised concerns related to the ballot kit so that Amazon could provide that information to the NLRB to help promote voting. Tr. 1031–32 (Logan). The MCOs and consultants also showed employees a sample generic ballot kit and discussed the multi-step process for validly completing the ballots. Tr. 1033 (Logan). Amazon did not use MCOs or consultants to poll employees about whether they supported the Union. In fact, Amazon specifically told the MCOs and consultants not to ask employees whether they had voted, how they had voted, or whether they supported the Union. *Id.*

Amazon distributed "swag" during the campaign. Amazon made "I voted" Peccy pins available to employees during one-on-one engagements ("Peccy" is an Amazon mascot). Tr. 1087 (Logan); Ex. E-72. And it similarly made "vote" shirts available in late January/early

February. Tr. 1090 (Logan). The shirts were placed on tables inside the facility for employees to take. The shirt’s design—“VOTE”—was similar in its messaging and color scheme to the large banners that Amazon displayed on the side of the facility. Tr. 1091 (Logan).

Amazon also made available “vote no” swag, including a Peccy pin, rearview mirror tags, and lanyard tags—but only during Phase 1 of the campaign. Employees could take these materials, at their discretion, from a table in the back of the room where small group meetings occurred. Tr. 1092–93 (Logan). Amazon made no effort to track who took such materials. *Id.*

C. The Hearing Officer’s Report.

On August 2, 2021, Hearing Officer Meyers issued her Report on Objections. She recommended sustaining Union Objections 1, 2, 3, 4, 6, and 17 relating to the USPS mailbox and the part of Objection 11 that characterized making “vote no” paraphernalia available as impermissible polling. Report 1–2, 60. Based on these objections, she recommended that the Region order a second election. Report 60. She recommended accepting the Union’s withdrawal of six objections and dismissing all other remaining objections. Report 3 n.2, 60. For example, the Hearing Officer found that Amazon did not threaten loss of existing benefits, Report 37, did not maintain a list of employees who had voted, Report 47–48, did not isolate employees because of their Union activities, Report 51–52, and did not engage in employee interrogation. Report 58.

III. ARGUMENT

A. The Evidence Showed That the Union’s Objections Provide No Basis for a Second Election.

The Hearing Officer acknowledged that “representation elections are not lightly set aside.” Report 3 (citation omitted); *see also, e.g., NLRB v. Monroe Auto Equip. Co.*, 470 F.2d 1329, 1333 (5th Cir. 1972). For this reason, “the burden of proof on parties seeking to have a

Board-supervised election set aside is a heavy one.” Report 3 (citation omitted); *see also, e.g., Safeway*, 338 NLRB at 525.

But in practice, the Hearing Officer’s analysis relieved the Union of this heavy burden. Setting aside this election required more than proof that some objectionable conduct occurred.³ The Union also had to provide specific evidence that the conduct might “have changed the outcome of the election in light of the tally of votes.” *Frito Lay, Inc.*, 341 NLRB 515, 515 (2004). Even when an employer engages in an **unfair labor practice** during the critical period—which has not been finally determined by the Board here—the Board will not set aside the election based on de minimis misconduct that “could not have affected the election.” *Flamingo Las Vegas Operating Co.*, 360 NLRB 243, 246–47 (2014). In deciding whether the objected-to conduct might “reasonably have affected the election results,” the Board declines to rest its decisions on “unlikely speculations.” *Safeway*, 338 NLRB at 527; *see also, e.g., J.C. Brock Corp.*, 318 NLRB 403, 404 (1995) (The Board “requires more than mere speculative harm to overturn an election” (citation omitted)); *Admiral Petroleum Corp.*, 240 NLRB 894, 894 (1979) (refusing to set aside an election based on “speculation as to the possible effects of [a supervisor’s allegedly coercive] statements”); *Pride Made Prods., Inc.*, 233 NLRB 182, 182 n.2 (1977) (The Board “does not set aside an election based on mere speculation that election

³ Various factors affect whether “employees could freely and fairly exercise their choice in the election”:

(1) the number of the incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party in canceling out the effect of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the [party against which objections are filed].

Avis Rent-A-Car Sys., 280 NLRB 580, 581 (1986).

standards have been impugned.”).

The Hearing Officer failed to identify conduct satisfying these standards. Neither arranging for the mailbox nor making “vote no” materials available constitutes objectionable conduct. And even if it did, there is no non-speculative ground for concluding that such conduct could reasonably have affected the results of this very lopsided election.

1. The Mailbox (Objections 1–4, 6, 17).

a. *The Mailbox Served a Perfectly Legitimate Purpose.*

There is nothing objectionable about Amazon’s appropriate and lawful request to the USPS to enhance employees’ ability to return their mail ballots. In an obvious way, Amazon’s efforts to obtain a secure mailbox for the BHM1 facility furthered “the Board’s goal of ensuring maximum voter participation.” *Baker Victory Servs., Inc.*, 331 NLRB 1068, 1070 (2000); *see also Versail Mfg., Inc.*, 212 NLRB 592, 593 (1974) (noting that elections are to be scheduled “at times and places . . . that will best [e]nsure maximum participation”); Memorandum GC 20–07, Guidance Memorandum on Representation Case Procedure Changes, at 7 n.10 (June 1, 2020) (recognizing that elections should be scheduled on dates “that enhance the opportunity for employees to vote”). There is no dispute, as the Hearing Officer stressed, that employees had many other opportunities to mail their completed ballots. *See* Report 11; Ex. E-77 (showing hundreds of other USPS mailboxes near BHM1). But employees might have felt that they did not have a secure or reliable way to mail their ballots from their homes.⁴ And without the USPS

⁴ The Hearing Officer minimized employee testimony regarding concerns that Union agents might be able to tamper with ballots mailed at home. Report 18 n.8. But such worries are understandable given the history of this case and legitimate concerns about the Union’s mysterious ability to come up with huge numbers of additional showing-of-interest cards in short order, which the Region has never explained. On November 24, 2020, Amazon requested a check of the Union’s showing of interest because the Union had represented that the petitioned-for unit of “fulfillment center employees” consisted of 1,500 associates when in fact the true number of associates at the time was between 5,500 and 5,800. The Region told Amazon on December 10, 2020 that it was “administratively satisfied” with the Union’s showing of interest, and stated on December 15, 2020 that the Union had met the 30% showing of interest

mailbox at BHM1, employees might have had to make a special trip out of their way to use a secure USPS mailbox. The mailbox provided a secure option for mailing in ballots at a location where employees were already guaranteed to be throughout the election period.

Still, employees understood perfectly well that they had other options for mailing their ballots if they did not want to use the mailbox at BHM1. No one was obligated to use this mailbox instead of the many potential alternatives, as several employee witnesses—including the Union’s—acknowledged. Tr. 143–44, 160 (Richardson); Tr. 240 (Bates); Tr. 476 (Pendleton); Tr. 747 (Woods). Not one witness, moreover, claimed that he or she personally used the mailbox. Many employees chose not to, perhaps because the Union’s messaging fostered paranoia about the mailbox’s security. *See* Tr. 143, 160 (Richardson); Tr. 459 (Pendleton); Tr. 747 (Woods); Exs. E-119, E-120. Testimony from two neutral USPS employees, however, proved beyond doubt that the mailbox was completely secure, under USPS control, and within USPS policy. *See* Tr. 855–56, 865–66, 908–10 (Jay Smith); Tr. 1406–15, 1430–32 (Rhoten-Coleman). And the Hearing Officer appropriately rejected any suggestion that the mailbox was not secure. Report 15, 18 & nn.6–7.

The Hearing Officer did not deny that Amazon’s sincere motive in arranging for the mailbox “served the legitimate cause of encouraging voter participation.” Report 25. She properly found that Amazon sought to “provid[e] associates a convenient location to mail in their ballots,” to make it “as easy as possible for employees to vote by mail, and to encourage as high a turnout as possible.” Report 11–13 (emphasis omitted). Yet she brushed this intent aside on

requirement based on a unit consisting of 5,591 employees. Of course, even if the Union obtained authorization cards from 100% of the 1,500 associates that the Union originally believed were in the petitioned-for unit, that still would not have met the 30% showing. Neither the Union nor the Region has ever explained to Amazon how the Union—which would go on to receive a total of 738 unchallenged votes—somehow managed to produce a showing of interest from at least 1,677 employees (30% of 5,591) so quickly after it mistakenly claimed that only 1,500 employees were in the petitioned-for unit in total.

the ground that improper intent is not necessary to find objectionable misconduct. Report 25. Despite her stated unwillingness to factor in Amazon's legitimate motivations, however, the Hearing Officer devoted much discussion to random factual details in an apparent effort to cast doubt on Amazon's motives. But these observations do not actually undermine Amazon's legitimate motivations, and at times the Hearing Officer's discussion is internally inconsistent. For instance, the Hearing Officer implied that it was odd that Amazon was willing to purchase a mailbox using its own funds, but she noted at the same time that USPS customers normally do purchase their own mailboxes. *Id.* Regardless, Jay Smith, Director of Enterprise and Key Accounts at the USPS, testified that the mailbox was fully within USPS policy and that "it's common to have customers ask for collection boxes," which is "not an unusual request for a customer to make." Tr. 902–03, 913–14 (Jay Smith). The Hearing Officer also objected that the mailbox was a neutral-colored cluster box unit, but she acknowledged that Amazon originally requested a traditional blue USPS mailbox. Report 12–13, 25. It was the USPS that decided, for its own reasons, to switch the blue mailbox to the USPS-owned, used cluster box unit. Tr. 867–68, 871, 873 (Jay Smith); Exs. U-21 at P-00262, U-23 at P-00252, U-27 at P-00302–04.

The Hearing Officer also emphasized the lack of USPS markings on the mailbox and lack of evidence about which employees saw USPS employees install the mailbox, ostensibly to suggest that employees might have been confused about whether it was an official USPS receptacle. Report 27. But she acknowledged that Amazon truthfully and unequivocally told employees that the USPS had installed the mailbox, *see* Exs. E-1, E-2, E-3, E-4, and she noted that an official USPS vehicle serviced the mailbox six days a week. Report 18. It is undisputed that there were no markings on the mailbox that indicated it was Amazon's property. Tr. 152–53 (Richardson). There is no evidence, and no reason to speculate, that employees were confused.

In a similar vein, the Hearing Officer implied that Amazon exercised improper influence over the USPS and had sole authority over the mailbox's location. Report 14. But the Hearing Officer conceded that the relationship between Amazon and the USPS was almost entirely invisible to employees, Report 29, and so it could not possibly have affected the election results. The Hearing Officer's characterization is also inconsistent with the facts: the USPS's internal emails and the witness testimony explain that the process of selecting an appropriate location was collaborative, Tr. 925 (Jay Smith); Tr. 977–79 (Harris); Ex. U-22 at P-00301, and that is consistent with standard USPS protocol, as reflected in the Union's own exhibit describing how customers should decide where to install cluster box units and other mailboxes. Ex. U-31 at 19–20. For example, it was the USPS that decided where, out of the three suggested locations, the mailbox should go, and it was the USPS that picked the final location based on convenience, traffic flow, and mail carrier safety. Tr. 978–79 (Harris); Ex. E-38. Besides, the Hearing Officer identified several ways in which the USPS exercised veto power over aspects of the installation, belying any suggestion that Amazon was simply calling the shots. Report 12–13, 17.

None of these minor details helps show that a mailbox serving an indisputably legitimate purpose was objectionable. From employees' perspective, the mailbox was just a mailbox that they could use or not use based on their own preferences and convenience. And, as discussed next, the Hearing Officer's attempt to use the D&DE to discredit the mailbox fares no better.

b. *The Mailbox Did Not Contravene the D&DE.*

The Hearing Officer seemed to base part of her reasoning on the notion that the mailbox was inconsistent with the D&DE. Report 11, 25–26. The Union made similar claims during the election.⁵ But as the Hearing Officer ultimately acknowledged, the “Acting Regional Director

⁵ As detailed below, basic estoppel principles preclude the Union from profiting from its own mischaracterizations of the D&DE. See *infra* p. 37.

did **not** have the prescient foresight to prohibit the Employer from pressuring the USPS to install a mailbox, or CBU.” Report 25 (emphasis added). This point should be dispositive: it is an admission that the D&DE did not prohibit the mailbox, period. If the D&DE did not prohibit the mailbox, then the rest of the Hearing Officer’s rationale about undermining the authority of the Board collapses.

Oddly, the phrasing of that sentence—“prescient foresight”—suggests that the Hearing Officer was confident that the Regional Director would have prohibited the mailbox had she confronted the question. Even if so, the Hearing Officer never explained the basis for this counterfactual prediction or identified anything in the D&DE that would have compelled Amazon to make the same prediction. Instead, she attempted to distract from these questions through invective, suggesting (1) that Amazon was being “disingenuous” in denying that the D&DE rejected the proposed NLRB-controlled ballot box, (2) that Amazon was “scapegoating” the USPS, and (3) that Amazon was trying to “‘out lawyer’ the Acting Regional Director.” Report 25–26, 29. Amazon is guilty of none of these accusations, and this harsh language cannot change the fact that nothing in the D&DE precluded the mailbox, even implicitly.

First, Amazon has never denied that the D&DE did not accept Amazon’s proposal of a NLRB-controlled ballot box. The Hearing Officer’s accusation here is bizarre because, as she notes elsewhere, Amazon’s Request for Review obviously asked the Board to reverse course and approve an NLRB-controlled ballot box. Report 11.⁶ In its June 11, 2021 post-hearing brief on the Union’s objections, moreover, Amazon even quoted that language from its Request for Review, but also observed that the D&DE **did not actually discuss** the proposed NLRB ballot

⁶ The Report states that the Board denied Amazon’s Request for Review on the same day as the USPS mailbox installation, Report 11, but in fact the Board denied the Request for Review on February 5, 2021, the day after the mailbox installation. Obviously, neither the USPS nor Amazon acted in response to the Board’s denial.

box, let alone offer a rationale that would have equally applied to a USPS-installed, general-purpose mailbox. Amazon Post-Hearing Br. 16–17. That is significant because the law assesses the Board’s rulings based on what the Board **actually says**, not based on the Board’s “silence,” Report 25, or on what someone might later guess that the Board would have said had the Board confronted the issue. *See, e.g., SEC v. Chenery Corp.*, 318 U.S. 80, 93–94 (1943) (“Its action must be measured by what the Commission did, not by what it might have done.”); *SEC v. Chenery Corp.*, 332 U.S. 194, 196–97 (1947) (“[A]dministrative action is to be tested by the basis upon which it purports to rest[.]”). Beyond that basic administrative law principle, due process requires agencies to give fair notice of any obligations that they are imposing on private parties. *See, e.g., FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (discussing “two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way”). The Hearing Officer disregarded the D&DE’s failure to explain why the Region was not accepting the NLRB ballot box proposal, and she cited no principle in the D&DE that extended to a USPS mailbox.

Second, Amazon has never tried to use the USPS as a scapegoat. It is unclear where the Hearing Officer got that idea. The USPS is not to blame for installing the mailbox because no one is to blame: the mailbox served a legitimate purpose and was not in any way unlawful or improper. Amazon did stress that the USPS is a separate government agency as an additional reason why it is inappropriate to read the D&DE as implicitly prohibiting installation of the mailbox. As a general matter, mail collection at BHM1 is unquestionably within the USPS’s jurisdiction, not the Board’s. So even if the Board had authority to do so, it would have to speak clearly for a reasonable reader to infer that the Board intended to restrict a party’s interactions

with an independent federal agency. Surely the Board would proceed carefully before deciding to unilaterally regulate a matter—mail collection—that clearly falls within the USPS’s domain. *See S. Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942) (“[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives.”). Again, the Hearing Officer never explained why a reasonable reader of the D&DE should have thought otherwise.

Third, Amazon has never suggested a desire to “out lawyer” the Regional Director. For the reasons just discussed, Amazon had reasonable grounds for thinking that the Region’s rejection of an NLRB ballot box did not preclude a USPS mailbox and, as the Hearing Officer conceded, the D&DE did not actually prohibit the mailbox. The Board cannot lawfully condemn a party for making legal arguments. Due process prohibits the government from doing that. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (“[F]or an agent of the State to pursue a course of action whose objective is to penalize a person’s reliance on his legal rights is ‘patently unconstitutional.’” (citation omitted)). So does the First Amendment’s right to petition the government, under which the Board may not penalize parties for exercising their right to pursue litigation. *See, e.g., BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 536 (2002) (rejecting a Board standard that permitted it “to penalize” parties for filing “reasonably based but unsuccessful suits”); *cf. Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (recognizing that the right to petition extends to “administrative agencies”). The Region should repudiate the Hearing Officer’s suggestion to the contrary.

In short, there is no real dispute that the D&DE did not prohibit the USPS’s installation of the mailbox. The Hearing Officer’s reasons for faulting Amazon nevertheless do not withstand scrutiny and would be deeply problematic if adopted.

c. *The Mailbox Was Not Objectionable Under Board Precedent.*

The Hearing Officer may have leaned so much on the D&DE because there is no on-point authority that bars the mailbox here. As the Hearing Officer noted, “[w]hether an employer engages in objectionable conduct by causing the USPS to install a mail collection apparatus at its facility during a mail ballot election is a question of first impression for the Board.” Report 18. The Hearing Officer nonetheless accepted several—but not all⁷—of the Union’s attempts to shoehorn the USPS mailbox into existing categories of objectionable election conduct. But none of those categories applies on these facts, and the Region should not try to minimize the lack of legal support for the Union’s theories by resorting to the Hearing Officer’s “totality of the circumstances” framework. Report 24, 30. Zero plus zero plus zero does not equal one.

i. To start, the Union was wrong to compare the mailbox to an employer-created, official polling location (Objections 1 and 2). The evidence showed that the mailbox was just a mailbox and that Amazon’s employees had no objective basis to view it otherwise. Visibly identifiable USPS employees installed it in broad daylight, in plain view of BHM1 employees. Tr. 981–84 (Harris). After installation, it functioned like a normal mailbox. It had a slot clearly marked “OUTGOING MAIL.” Ex. E-5. There were no NLRB election officials or party observers stationed near it nor any indications that it was an official NLRB voting area. Tr. 150–51 (Richardson). There were no Amazon managers or supervisors stationed nearby nor any signs that Amazon owned or controlled the mailbox. Tr. 152–53, 165 (Richardson). As the Hearing Officer acknowledged, Report 18, a USPS letter carrier delivered and picked up the mail in a USPS-branded mail truck six days a week. Tr. 1423, 1432 (Rhoten-Coleman); *see also* Tr.

⁷ The Hearing Officer correctly rejected the Union’s suggestion that the mailbox caused objectionable polling of employees or solicitation/harvesting of their ballots (Objections 5 and 7). Report 22–24.

880 (Jay Smith). The mailbox was an “everyday” mail delivery and pickup point for the facility, like any other mailbox. Tr. 891, 923 (Jay Smith). The Hearing Officer suggested that the placement of this mailbox at BHM1 was only “temporary.” Report 26. But that is not true: the USPS ultimately decided to make this mailbox the “permanent place for delivery every day of mail and outgoing mail” because it provided “a secure, more efficient way, long-term, that benefited the Postal Service” in comparison with the earlier practice of delivering mail inside the BHM1 facility. Tr. 879, 883, 891–93, 907–08 (Jay Smith); Ex. U-23 at P-00251. In these circumstances, no voter could have been duped into thinking that the mailbox was somehow an NLRB manual polling location, an NLRB-controlled ballot box, or a mandatory voting site, particularly not when Amazon sent out multiple communications to employees making clear the opposite: the mailbox was a USPS-installed and serviced mailbox that served as an additional secure mailing option for employees. Exs. E-1, E-2, E-3, E-4. Several employees (including the Union’s witnesses) recalled seeing these communications. Tr. 145–46, 153 (Richardson); Tr. 359–61 (Wallace); Tr. 424–25 (Bibbs); Tr. 474–75 (Pendleton); Tr. 831–32 (Jackson).

The Hearing Officer apparently credited the Union’s argument that the USPS mailbox “usurped a Board function, and undermined the integrity of the Board election.” Report 19. But the case law on those issues deals with circumstances not remotely similar to the situation here. For instance, *Alco Iron & Metal Co.*, 269 NLRB 590, 591 (1984), addressed improper **Board** conduct that prevented the election from taking place in an “atmosphere of impartiality.” Specifically, “although the Regional Director knew of the predominantly Spanish-speaking electorate, the Board agent conducting the election could not speak or write Spanish and delegated to a Spanish-speaking [union] observer the responsibility for explaining voting procedures to Spanish-speaking voters.” *Id.* The Board agreed with the employer that “such

conduct compromised the Board's neutrality in [the] election proceeding" and that "the commission of an act by a Board agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is a sufficient basis for setting aside that election." *Id.*; *see also S.F. Sausage Co.*, 291 NLRB 384, 384 n.1 (1988) (explaining that, "in *Alco*, the Board agent permitted the union observer to interpret and explain the voting procedure to Spanish-speaking employees without the Board agent's participation, thereby effectively turning over control of the election to the observer").

Here, in contrast, there is no evidence that the Board allowed Amazon to take over the Board's election procedures. For example, as the Hearing Officer found, there is no evidence that Amazon controlled the handling of the mailbox contents, including any mailed ballots, or controlled access to the mailbox. The USPS handled the former, just like all other mail ballots sent to Region 10, and the latter was open to all forms of mail. Amazon also repeatedly made clear to employees that the mailbox was not an Amazon box but an official USPS mailbox under the USPS's exclusive control. Tr. 145–46, 153 (Richardson); Tr. 359–61 (Wallace); Tr. 424–25 (Bibbs); Tr. 474–75 (Pendleton); Tr. 831–32 (Jackson); Exs. E-1, E-2, E-3, E-4. Amazon also conveyed throughout the election that the Board had authority over the election and that employees should contact the Board directly if they encountered any ballot-related issues. Tr. 1356–58 (Moss); Exs. E-4, E-61, E-64, E-84. The Board, meanwhile, also made clear to employees that the Board was fully in charge of the election, including in the election notice posted at the facility and the instructions it sent to voters about how to mail in their ballots. Exs. J-2, J-3. If, instead, the Board had installed its own, election-specific ballot box, and had given employees no instructions on how to use the box but had told Amazon to station an observer at

that collection box to explain how to do so, perhaps cases like *Alco* would be relevant. But nothing remotely comparable happened here. The Board never set up its own ballot box, and concluding that a USPS mailbox usurps the Board's control over elections is untethered from practice or precedent.

The Hearing Officer's citation of *Monroe Manufacturing Co.*, 200 NLRB 62, 64 (1972), where the Board set aside a narrow, 67–71 election, is likewise inapt. There, the employer's vice president approached by himself three employees waiting in line to vote and unilaterally told them that they were not eligible to vote. *Id.* at 64, 72, 74. That conduct violated the parties' pre-election agreement that both sides would stay "away from the voting line" and also ran afoul of *Milchem, Inc.*, 170 NLRB 362, 362 (1968), in which the Board held that "sustained conversation with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election." *See Monroe Mfg.*, 200 NLRB at 72, 74. When one of the parties assumes the significant function of unilaterally conveying to employees that they may not vote in the election, one can understand how employees might conclude that this party "was acting in some manner for or in concert with the Board official in the conduct of the election." *Id.* at 74. There was no reason for the employer's actions, either; it could easily have left voter eligibility to the official company and union observers. *Id.* For all these reasons, the Hearing Officer was wrong to extrapolate from the communications in *Monroe Manufacturing* that setting up a mailbox "interfere[s] with the Board's election procedures" in the way that telling voters they have no right to vote in an election does. Report 29–30.⁸ Indeed, the mailbox is exactly the opposite; it made it easier for

⁸ The Hearing Officer also cited two other cases addressing the integrity and neutrality of Board election procedures, Report 31, but their facts are even further afield. *See Fam. Serv. Agency, S.F.*, 331 NLRB 850, 851 (2000) (holding that unions, like employers, may not use statutory supervisors as election observers); *Glacier Packing Co.*, 210 NLRB 571, 573 (1974) (setting aside election where employees

all employees to vote and expressed no message about voter eligibility at all.

It is also far-fetched to claim that an employer's setting up of a mailbox equates to "unilaterally determining its own procedures for mailing ballots," Report 30, or that the mailbox "created the impression that the Board had, either voluntarily or involuntarily, ceded its authority for collecting ballots and establishing procedures for conducting the election," Report 31. Here, the Board always had exclusive control over the process of completing mail ballots and preparing them for mail, as reflected in the instructions that it sent to employees. Ex. J-3; *see also* NLRB Casehandling Manual (Part Two) Representation Proceedings § 11336 (Sept. 17, 2020). In any mail-ballot election, however, the Board never has control over the actual mail itself, which is necessarily entrusted to the USPS's operations, both for the provision of ballots to employee voters and for voters' return of ballots. Nor do the Board instructions specify that mailboxes on or near employer premises should be shunned.

Even though the Hearing Officer rejected the Union's analogy of the mailbox to the solicitation of employee ballots, she drew comparisons with the Board's recent decision on ballot solicitation/harvesting in *Professional Transportation, Inc.*, 370 NLRB No. 132 (2021). But *Professional Transportation's* reasoning is inapplicable here. Again, the USPS's installation of the mailbox could not have undermined voters' impression that the Board remained "in complete control of the election process." *Id.* at 2. Nothing in "the Board's mail-ballot instructions" (or the D&DE) prohibited Amazon from asking an independent government agency to install a secure, general-purpose mailbox. *See id.* at 3. Nor does such an installation equate to a "delegation of an important part of the election process" to someone other than the Board or imply that a party "was acting in some manner for or in concert with the Board official[s] in the

could reasonably interpret Board agent's "remarks and actions as indicative that the Board was opposed to the Employer's position in the election").

conduct of the election.” *See id.* at 2 n.6 (citations omitted). Even in mail-ballot elections, the Board’s responsibilities do not encompass—and historically have **never** encompassed—installing general-purpose mailboxes or collecting mail, and no voter would expect such tasks to be part of the Board’s responsibilities.

The implications of the Hearing Officer’s contrary approach are startling. Many employers have outgoing mail receptacles at the workplace that employees can use for any normal item of mail. Does that mean that the Board is not in control of mail-ballot election procedures in those workplaces? Can the losing party in a mail-ballot election point to a workplace’s mailroom as a ground for overturning the results? What if the union’s headquarters has a publicly accessible mailbox? The Board should be wary of suggesting that a party’s arrangements in connection with outgoing mail are a threat to election integrity, particularly as the Board may continue to order more and more mail-ballot elections than the Board’s historic practice. There is no question that the integrity and neutrality of Board election procedures are critically important. But it undermines the critical importance of these goals to suggest that they can be placed in jeopardy by something as mundane as one, optional mailbox that the employer makes clear is not under its control and not a required “voting” location. Report 8.⁹

⁹ While the NLRB has traditionally conducted the vast majority of elections through in-person, Board-supervised elections, the National Mediation Board (“NMB”) has long used internet and phone voting for representation elections. In analogous circumstances, the NMB has declined to find that employers’ efforts to facilitate voting or give employees options to complete or submit their electronic ballot—including through the use of employer equipment—constituted election interference. For example, in *Delta Air Lines*, the NMB found no impermissible interference despite union allegations that the employer-carrier established “on-site polling places” by “hanging campaign materials and voting instructions in computer work stations” and notifying employees “of their right to vote on company computers if they wanted to.” *Delta Air Lines, Inc.*, 39 NMB 53, 67–69 (2011). The NMB emphasized that, based on the record, only a “small number of flight attendants . . . voted on [employer]-owned computers” and that “employees voted where and how they felt most comfortable.” *Id.* at 70. The record in this case clearly shows that Amazon employees likewise understood that the mailbox here—which was USPS equipment, not Amazon equipment—was just one option out of hundreds to mail their ballots to the NLRB. Amazon’s written communications never coerced or forced employees to use this one mailbox, and no employee testified that he or she felt coerced or forced. The Board should therefore find

ii. The Hearing Officer also erred in crediting the Union’s accusations about surveilling employees’ union-related activities (Objections 3 and 4). Given the undisputed evidence and existing Board law, there is no merit to the surveillance objections. The Hearing Officer correctly noted that “[a]n employer does not violate the law when existing surveillance cameras record employees Section 7 activity,” but an employer does violate the law by “install[ing] cameras **for the purpose** of recording Section 7 activities.” Report 28 (emphasis added); *see, e.g., Brasfield & Gorrie, LLC*, 366 NLRB No. 82, slip op. at 5 (2018); *Pac. Coast Sightseeing Tours & Charters, Inc.*, 365 NLRB No. 131, slip op. at 11 (2017); *Nat’l Steel & Shipbuilding Co.*, 324 NLRB 499, 501 (1997). Once again, however, the Hearing Officer implausibly sought to “extrapolate” from Board precedent to find grounds for criticizing the mailbox here: “If it is unlawful to install cameras for the purpose of recording Section 7 activities, one can extrapolate that it is equally unlawful to encourage employee Section 7 activity . . . at a location under video surveillance.” Report 28.

The core problem with this “extrapolation” is that Amazon undisputedly had neither the ability nor the intention to surveil any Section 7 activities at the mailbox.¹⁰ Its security cameras (which have been a part of Amazon’s normal operations since before March 2020) were completely incapable of determining who mailed ballots at the mailbox. They are 37.5 feet off the ground on the outside of the building, and most are located over 175 feet from the mailbox. Tr. 1201–02, 1204, 1210–11, 1216, 1218 (Street). Contrary to the implications from the Hearing

persuasive the NMB’s reasoning in analogous circumstances and hold that Amazon’s efforts to secure a USPS mailbox and notify employees that it was an optional place to mail ballots are not objectionable conduct that warrants a second election.

¹⁰ Another problem with the extrapolation is that there is no real evidence that Amazon urged employees to specifically use the USPS mailbox outside BHM1. Amazon appropriately encouraged employees to vote and to personally place their ballots in a secure mailbox to ensure that the Board received them by the deadline, and it simply presented the mailbox outside BHM1 as a convenient option. *See, e.g., Ex. E-1* (“We want everyone to vote in this election and are urging all Associates to mail their ballots in a secure mailbox and to mail their ballots themselves.”); *see also* Tr. 216 (Bates); Tr. 1375–76 (Moss).

Officer's erroneous claim that the mailbox is less than 50 feet from the building and "immediately beneath the visible surveillance cameras mounted on the Employer's main entrance," Report 1–2, the closest camera on the building's exterior is located about 127 feet away and cannot help identify users of the mailbox. Tr. 1213 (Street). Its default long-range view of the mailbox area would be unusable to monitor mailing activity because of a lack of detail, and its zoomed-in view would be equally unusable because of excessive pixelation. Tr. 1203, 1212–15 (Street); Exs. E-49, E-50. And the opaque tent between the mailbox and the security cameras blocked any view of who deposited mail in the box. So even if Amazon could theoretically have figured out who walked into the tent—something Amazon never tried to do—there still would have been no way to tell whether employees were mailing in their ballots once inside the tent, much less whether they were supporting the Union. Tr. 1123 (Logan); Tr. 1218, 1222–23, 1283–84, 1331–32 (Street). In addition, Amazon forbade managers, supervisors, and security guards from entering the tent during the election's voting period. Tr. 990–91 (Harris); Tr. 1225–26 (Street); Ex. E-40. Amazon had no way of knowing who was in the tent or whether someone was dropping off a ballot, visiting out of curiosity, or paying an electric bill. Tr. 1334 (Street). The tent fatally undermines the Hearing Officer's portrait of the mailbox as being "in the direct line of [the] surveillance cameras." Report 28. The Report rather implausibly imagines that employees would walk around the parking lot toward the tent with ballots in plain view, Report 16, but there is no evidence that any such incident had ever occurred.

The Hearing Officer did not dispute that Amazon lacked the ability to surveil anyone's use of the mailbox and did not attempt to do so. Instead, she maintained that "there was no evidence that the inadequacy of the surveillance cameras, or the alleged directive restricting review of the surveillance footage, was information disseminated to employees, or that there was

widespread knowledge of the equipment’s alleged inadequacy.” Report 28. But if, as the Hearing Officer elsewhere indicated, the key question is whether Amazon was using cameras for the purpose of surveilling Section 7 activity or encouraging Section 7 activity at locations under surveillance, whether Amazon actually could and did engage in surveillance is **dispositive**. Neither the Hearing Officer nor the Union has cited any precedent for a surveillance finding where the preexisting camera was located 127 feet away and the door was located 135 feet away from the purported polling area; where the spot for “voting” was picked by a third party (the USPS, *see* Tr. 977–78 (Harris); Ex. E-38) and not the employer; or where the alleged surveillance would have required seeing through solid objects like an opaque tent.

Shifting gears, the Hearing Officer shifted the inquiry away from Amazon’s actual purposes and surveillance capabilities to focus on what employees subjectively believed about them. Here, too, however, the facts do not support her conclusions. Although the Union’s public messaging tried to make employees think that Amazon was surveilling use of the USPS mailbox, Ex. E-120 at 0:01–0:25, 2:37–2:39, Union witnesses admitted that the tent shielded the mailbox from view and that no cameras could see inside. Tr. 164 (Richardson); Tr. 747–48 (Woods). And there is zero support for the Hearing Officer’s vague claim of “ample evidence that employees reasonably believed that the Employer was able to surveil employees’ ingress and egress into the tent, and could discern which employees mailed ballots from the CBU.” Report 28. There is no evidence that employees held that belief, much less that such a belief was reasonable.¹¹

¹¹ The Hearing Officer did not connect her conclusion about employees’ reasonable beliefs about the capabilities of the cameras to any specific employees, although earlier in the Report she stated that “[m]any employees, including Daryll Richardson, Jennifer Bates, Emmit Ashford, Daryll Craig, Hope Pendleton and Kevin Jackson all credibly testified that they believe that there are cameras in the parking lot.” Report 17. A review of the record, however, including these employees’ testimony, undermines the Hearing Officer’s conclusion that employees reasonably believed that cameras could have seen what

In all events, even if some employees felt (reasonably or not) that Amazon could see the mailbox inside the tent, that could not have had a reasonable effect on their Section 7 activities because they did not need to go near the mailbox to mail in their votes. There were hundreds of alternatives, as Amazon made clear to employees. Tr. 145–46, 149–50, 153–54 (Richardson); Tr. 361–62 (Wallace); Tr. 424–25 (Bibbs); Tr. 474–75 (Pendleton); Tr. 831–32 (Jackson); Exs. E-1, E-77. Indeed, the potential impression of surveillance here is far less than the impression that could exist in a typical in-person, manual election on an employer’s premises because the USPS mailbox at BHM1 was just one of more than 200 secure mailbox options (and thousands more private options) for employees to use to mail in their votes. *See, e.g., Lowes HIW, Inc.*, 349 NLRB 478, 479 & n.7 (2007) (rejecting hearing officer’s “unsupported” conclusion that employer “created the impression of surveillance” when its employee drove voters in golf cart from parking lot to voting site, held the voting-site door open for them, and told them to “have their votes ready,” all while wearing an anti-union t-shirt). Employees understood that using the mailbox was simply “an option.” Tr. 476 (Pendleton); *see also* Tr. 141–45, 149 (Richardson); Tr. 240 (Bates); Tr. 283 (Ashford); Tr. 734–35, 739, 747 (Woods). So they would not have reasonably thought that Amazon was keeping track of who voted even if they thought that Amazon could somehow see who dropped mail into the mailbox.

iii. For similar reasons, the Hearing Officer’s portrayal of the sign on the tent as objectionable electioneering fares no better (Objection 6). The sign affected only one possible

employees in the tent were doing. For example, four of these employees admitted on cross-examination that they did **not** know whether Amazon had cameras that could see into the tent. Tr. 239 (Bates); Tr. 311–12 (Ashford); Tr. 399 (Craig); Tr. 483 (Pendleton). And while the other two of these employees contended that there were cameras on the parking lot light posts, pictures of the light posts prove otherwise. Tr. 75, 162 (Richardson); Tr. 813, 827–28 (Jackson); Exs. E-45, E-46, E-47, E-53. In addition, the Hearing Officer found that some of Jackson’s testimony about the mailbox was not credible. Report 15 n.7. And under estoppel principles, *see infra* p. 37, the Union cannot point to its own false propaganda about surveillance of the mailbox to justify employees’ purported concerns.

location out of hundreds for mailing in ballots and simply encouraged employees to “speak for yourself” and to “mail your ballot here.” Ex. E-6. These statements are facially neutral and merely encourage voting. While some witnesses testified that Amazon had a “speak for yourself” message during the election, that message reinforces Amazon’s objective of maximizing voter participation. *See* Tr. 1032 (Logan) (describing Amazon’s “100 percent employee participation” goal based on Amazon’s desire for every associate to “have a voice on . . . their future at BHM1”). The Union likewise referred to voting (and petitioning for election) as employees’ opportunity to make their voices heard. Tr. 169–70 (Richardson); Ex. E-7 (“On November 20th, 2020 YOUR VOICE was heard. On March 29th, 2020 YOUR VOICE will be heard again at Amazon in Bessemer, Alabama.”). And the Union guaranteed employees: “You WILL have a voice in your future.” Exs. E-7, E-27. Both Amazon and the Union understandably believed that their respective positions better gave employees a voice in the workplace. But that is consistent with the policies of the National Labor Relations Act, which include protecting the rights of “full freedom of association, self-organization, and designation of representatives of [workers’] own choosing.” 29 U.S.C. § 151. At most, the meaning of “speak for yourself” is in the eye of the beholder and cannot sensibly be construed as an objectionable sentiment, let alone electioneering.

In any case, the Hearing Officer’s own findings demonstrate that this sign could not have undermined the entire election. As she recognized, even if employees decided to make use of the mailbox here, “it was unlikely that any employee entered the tent without having already completed the ballot,” and “since employees’ ballots were already cast, the Employer’s campaign messaging would have little, if any, influence on any voter’s decision.” Report 30. She dismissed this point on the ground that “[t]his distinction . . . is not one articulated by the

Board.” *Id.* But that is not true. The Board’s electioneering cases turn on the possibility of improper last-minute influence, as encapsulated in the Board’s statement that “[t]he final minutes **before an employee casts his vote** should be his own, as **free from interference** as possible.” *Bos. Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118 (1982) (emphasis added) (quoting *Milchem*, 170 NLRB at 362). During the final minutes of writing a choice on a mail ballot at home, there is no possibility that words on a tent miles away might interfere; and, by the time a voter approaches the tent for the ministerial act of dropping the ballot in the mail, the choice has already been made.¹²

But even if the Hearing Officer’s statement were accurate and the Board had not articulated this point, that could hardly be dispositive given the Hearing Officer’s recognition that “[w]hether and/or how the Board’s rules on electioneering during an election applies to a mail ballot election is an issue of first impression for the Board.” Report 23. Indeed, the Hearing Officer seems to have conceded that the sign does not violate existing Board law or any electioneering prohibition in the notice of election. *See* Ex. J-2. For this reason, the Hearing Officer’s reliance on *Bally’s Park Place, Inc.*, 265 NLRB 703 (1982), is misplaced. It is unsurprising that the Board there applied “strict rules against electioneering” in the area “at or near the polls” because “[t]he standard form ‘Notice of Election’ used in [that] case” warned that “[e]lectioneering will not be permitted at or near the polling place.” *Id.* at 703. The election notice here gave no such warning. Ex. J-2. The Hearing Officer’s citation of *American Medical Response*, 339 NLRB 23 (2003), is off base as well. There, the Board found that hanging a

¹² The poster here contrasts sharply with the poster in *Pearson Education, Inc.*, 336 NLRB 979, 979 (2001), which “depicted a list of strikes in which the Charging Party had engaged over the last several years” and hung in “an area every employee had to pass in order to vote.” Even if “speak for yourself” could be construed as a partisan statement, no one had to pass by it to vote and, even if someone did pass by it to place a ballot in the mailbox, he or she would have already filled out his or her ballot before doing so.

“prounion poster on election day to a tree on the Employer’s property approximately 100 feet away from the polling area, not visible from the polling room, was **not** improper electioneering.” *Id.* at 23 n.1 (emphasis added).

iv. Finally, the Hearing Officer accepted the Union’s claims that the mailbox was an improper benefit during the critical period (Objection 17). The Hearing Officer cited no authority for the suggestion that neutrally facilitating employees’ ability to vote in a Board election—whether for or against representation—constitutes the sort of benefit that warrants scrutiny. Employees could equally use the mailbox to cast a vote for the Union as for Amazon. It provided a safe, convenient, and secure place to mail their vote—regardless of whether that vote was “Yes” or “No.” The Region should overrule this objection along with all the Union’s other mailbox-related objections.

The Board’s improper benefits cases instead confront the type of giveaways that provide obvious material benefits—such as a paid day off, *B & D Plastics, Inc.*, 302 NLRB 245, 245 (1991), or large cash prizes, *Valmet, Inc.*, 367 NLRB No. 84 (2019)—meant to curry favor for one particular side in the election. By comparison, “it is difficult to imagine” access to a convenient and secure mailbox “having any influence on employees’ votes one way or another.” *Raleigh Cnty. Comm’n on Aging, Inc.*, 331 NLRB 925, 925 (2000) (distinguishing *B & D Plastics* and finding no improper benefit where employer made a pre-election announcement that it would hold a celebratory dinner if employees voted against union representation because an “announcement of a victory dinner did not promise anything of a significant value”). This supposed benefit was not “granted for the purpose of influencing the employees’ vote in the election and . . . of a type reasonably calculated to have that effect.” *Red’s Express*, 268 NLRB 1154, 1155 (1984). There were hundreds of USPS mailboxes and thousands of residential mail-

collection points available to employees to vote. Ex. E-77. The addition of yet one more mail pickup location was not going to convince anyone to vote for Amazon. Indeed, there was no testimony that the addition of this one more mailbox was a factor in anyone's vote.

It is particularly hard to imagine the mailbox inducing votes in favor of Amazon given the Union's extensive efforts to vilify the mailbox. The Hearing Officer picked up on the Union's claims that installing a mailbox undermined the Union's own statements to employees that the D&DE prohibited the mailbox. As discussed already, *supra* Section III.A.1.b, nothing in the D&DE prevented Amazon from asking the USPS to install a new mailbox at the facility. So the Union's erroneous public assertions that "THE U.S. GOV'T DIRECTED AMAZON NOT TO SET UP A MAILBOX," Ex. E-120 at 1:41, that Amazon was "lying" about the mailbox, *id.* at 1:54–2:05, and that the Board had told Amazon, "no, we're not going to allow you to have your own box, unaccompanied on your property," *id.* at 2:26–33, were mischaracterizations of the Union's own making, for which Amazon cannot be held responsible. In fact, the Union is estopped from trying to benefit from any confusion that its own mischaracterizations created. *See, e.g., B. J. Titan Serv. Co.*, 296 NLRB 668, 668 n.2 (1989) (applying "the well-established principles that 'a party to an election is ordinarily estopped from profiting from its own misconduct'" (quoting *Republic Elecs.*, 266 NLRB 852, 853 (1983))). This estoppel principle applies not just to employers but also to unions that seek to use their own misconduct "to manufacture an election objection." *President Container, Inc.*, 328 NLRB 1277, 1278 (1999).

In any event, there is no reason to suspect that the installation of the mailbox had any influence on employees' votes. Even the Hearing Officer conceded that "employees were likely not privy to the Employer's many machinations to secure the CBU on the eve of the election." Report 29. All that employees would have observed, then, is that Amazon succeeded in getting a

mailbox shortly before the mailing out of ballots. Given (unsurprising) USPS witness testimony that “it’s common to have customers ask for collection boxes” and that these are not “unusual request[s],” Tr. 902–03, 913–14 (Jay Smith), the Hearing Officer’s concern that a mailbox installation could “imply that the Employer has the will and means to cause federal agencies to bend to its will,” Report 29, is unsupported hyperbole.

In the end, none of the Union’s or Hearing Officer’s theories for criticizing the mailbox withstand scrutiny. And merely invoking the “totality of the circumstances,” Report 24, 30, cannot make up for the lack of legal support for these criticisms. Amazon’s actions concerning the mailbox were not objectionable conduct whether considered individually or collectively. But as discussed next, even if they were objectionable, any such objectionable conduct could not have affected the election outcome.

d. *Even if Objectionable, the Mailbox Could Not Have Affected the Election Results.*

The Region need not even address whether the mailbox was objectionable because, even if it were, it cannot provide grounds for setting aside this lopsided election. As noted above, objectionable conduct is not enough, standing alone, to set aside an election. The Board also requires evidence that the conduct could “reasonably have affected the results of the election” without simply resorting to “unlikely speculations.” *Safeway*, 338 NLRB at 526–27; *see also Frito Lay*, 341 NLRB at 515; *Amveco Magnetics, Inc.*, 338 NLRB 905, 905 (2003).

While the Union’s objections never tried to explain how an extra mailbox could have distorted the outcome of an election it lost by 1,060 unchallenged votes, the Hearing Officer suggested that the mailbox might have had a decisive impact on the 2,000 or so eligible voters who did not cast a ballot. But to flip the election result, one has to indulge the hypothesis that, without the mailbox, the Union would have received at least 555 additional votes out of the

roughly 2,000 potential additional voters—even though the Union’s entire unchallenged vote count was merely 738 and the “no” votes outweighed the “yes” votes by an over 2–1 margin. *See Amveco Magnetics*, 338 NLRB at 905 (overruling objection to conduct that could not “have influenced enough employees to affect the results of the election, which the Petitioner lost by 10 votes and a nearly 2–1 margin”).

The Hearing Officer’s theory lacks any evidentiary basis. If the mailbox had a significant effect, there would have been a scintilla of testimony from one of the many employee witnesses that it influenced his or her vote. Instead, of the 17 employee witnesses who testified, not one suggested that the mailbox influenced his or her vote. Not one testified that he or she used the mailbox. Not a single witness self-identified as a non-voter, which means that there was no testimony from a non-voter about why he or she did not vote.

Nor does the Hearing Officer’s theory have the ring of plausibility. After all, far from hampering free choice, the new mailbox simply made it **easier** for employees to cast their votes using a secure and readily accessible USPS mailbox. In other words, the mailbox’s likeliest effect would have been to increase voter participation. And if employees thought that the mailbox had caused any of the problems found by the Hearing Officer, those problems logically would have motivated that person to simply **use a different mailbox** out of the over 200 other USPS mailing locations within a 20-mile radius of BHM1 and thousands of home address mailing locations rather than motivate the employee not to vote at all. *See* Ex. E-77.¹³

In the end, then, the Hearing Officer’s theory about the mailbox’s potential effect on the

¹³ This count likely underestimates the number of mailbox alternatives. While there are 232 USPS post offices and collection boxes within 20 miles of BHM1, Ex. E-77, the USPS website that Amazon’s text messages highlighted for employees also shows there are well over a hundred post offices/collection boxes within 20 miles of each of the 15 zip codes where the greatest numbers of BHM1 voters reside. *See* <https://tools.usps.com/find-location.htm> (last visited Aug. 16, 2021) (showing alternative options within 20 miles of zip codes 35215, 35020, 35023, 35211, 35214, 35405, 35022, 35208, 35216, 35064, 35209, 35228, 35244, 35235, 35127); *see also* Ex. E-1 (hyperlinking to this USPS website).

results rests on nothing but speculation—and implausible speculation at that. Such speculation is no basis for setting aside an election. *See, e.g., J.C. Brock Corp.*, 318 NLRB at 404; *Admiral Petroleum Corp.*, 240 NLRB at 894; *Pride Made Prods.*, 233 NLRB at 182.

2. The “Vote No” Materials (Objection 11).

The only other objection that the Hearing Officer recommends sustaining is one component of Objection 11. She concluded that offering “vote no” pins and rearview-mirror tags on tables in small group meetings during the first phase of Amazon’s campaign constituted objectionable polling of employees’ sentiment about the Union. As the Hearing Officer acknowledged, “there is no evidence of any type of actual coercion,” and Amazon evidently lacked any ability to “actually track which employees took the ‘vote no’ paraphernalia.” Report 41. And, in fact, Amazon did not keep track of information about who picked up these items. Tr. 1093 (Logan). Still, the Hearing Officer concluded that offering these items “could reasonably cause an employee to perceive that the Employer was trying to discern their support for, or against, the Union.” *Id.*

Neither evidence nor precedent supports the Hearing Officer’s conclusion. “[I]t is well settled that an employer permissibly may make antiunion paraphernalia available to employees at a central location, when unaccompanied by coercive conduct.” *Columbia Alaska Reg’l Hosp.*, 327 NLRB 876, 876–77 (1999) (finding nothing objectionable about a supervisor’s decision, a few days before the election, to leave a bag of “vote no” buttons in a common break/office area); *see also Black Dot, Inc.*, 239 NLRB 929, 929 (1978) (upholding election where “the Employer placed proemployer and antiunion buttons in a flowerpot that was hung on a wall in the employees’ cafeteria”).

Here, however, the Hearing Officer compared the availability of “vote no” materials on a table to circumstances in which employees were under actual pressure to take or refuse such

items. See *2 Sisters Food Grp., Inc.*, 357 NLRB 1816, 1818–19 (2011) (employer “created a situation where employees were pressured to make an ‘observable choice’ on the day of the election that demonstrated their support for or rejection of the union” by having a laundry room employee and a manager hand out the employer’s campaign t-shirts and beanie hats to employees in area that was being taped by security cameras); *Circuit City Stores, Inc.*, 324 NLRB 147, 147 (1997) (employer “created a situation in which employees would reasonably believe that a refusal to accept the [item] would be construed as a rejection of the employer’s position in the campaign” by having the store manager hand out personalized mugs to individual employees bearing those employees’ names); *Barton Nelson, Inc.*, 318 NLRB 712, 712 (1995) (employer “forced [employees] to make an observable choice that demonstrates their support for or rejection of the union” by having three supervisors personally distribute antiunion hats to their supervisees); *A. O. Smith Auto. Prods. Co.*, 315 NLRB 994, 994 (1994) (employer “effectively put employees in the position of having either to accept or reject [its] proffer” by “having its supervisors directly offer employees paraphernalia opposing the Union”); *Gonzales Packing Co.*, 304 NLRB 805, 805 (1991) (employer “solicit[ed] its employees on the day before the election to wear or display antiunion ‘NO’ stickers” by having the supervisor of half of the eligible voters “visit[] 10 eligible voters at their work stations and ask[] each if they wanted a ‘NO’ sticker”). In all these cases, employees would reasonably have felt that their actions were under scrutiny—either because the employer would have a record of the interaction (*2 Sisters* and *Circuit City*) or because a known supervisor who in turn knew the employee was personally handing out the items (*Circuit City*, *Barton Nelson*, *A. O. Smith*, and *Gonzales Packing*).¹⁴

¹⁴ Although the Hearing Officer also cited *Valmet, Inc.*, 367 NLRB No. 84 (2019), the Board there found that **no** polling occurred even though supervisors personally handed out copies of a campaign-related quiz that served as an entry form for an employer’s election-related raffle.

Here, on the other hand, there is no evidence that employees' decisions to pick up or not pick up pins or tags on the way out of small group meetings were observable in any meaningful way. Employees would have realized that Amazon could not and did not track the decisions made by roughly 6,000 employees leaving hundreds of meetings. The record does not support the idea that supervisors, managers, or agents were watching employees as they passed by the table, as Amazon's policy was simply to leave the materials on the table rather than to hand them out. Tr. 1153–54 (Logan). More than that, there is no evidence that the employees' own day-to-day supervisors or managers attended these meetings or that the employees and managers at the small group meetings even knew one another. While some members of the HR department also attended, small group meetings were conducted not by the employees' own business managers (the people who actually supervise the BHM1 employees and make decisions over issues like promotion or discipline), but by ER managers/MCOs and outside consultants. Report 6. These MCOs were "not stationed or assigned to BHM1" but instead were based at other Amazon locations. Tr. 1037 (Logan); *see also* Tr. 492 (Bell). In all likelihood, neither the MCOs nor the consultants personally knew the employees at these meetings, and vice versa. *See* Report 34 ("No employee identified the agent who spoke during the meetings they attended."). In this way, this case is closest to *San Gabriel Transit, Inc.*, Case 21-CA-39559, 2011 WL 3291250 (Div. of Judges Aug. 1, 2011), where campaign consultants invited employees to take paraphernalia on tables and the judge found no unfair labor practice based on polling or interrogation: "Even assuming employees perceived the consultants as proxies for their supervisors, [this] conduct does not rise to the level of that found unlawful in *A. O. Smith*, *Circuit City*, *Barton Nelson*, and *Gonzales*." No reasonable employee would have thought that management was monitoring 6,000 employees' decisions to take or not take a pin or tag at these meetings, much less that

those decisions could affect their employment or lead to “reprisal.” *Struksnes Constr. Co.*, 165 NLRB 1062, 1062 (1967).¹⁵

But even if the availability of these items were objectionable for some reason, it still would not support setting aside the election. There is no evidence that any employees would have felt pressure in how they voted because of the availability of these items. Unlike cases that the Hearing Officer cited, for example, these interactions took place well before ballots were even mailed, potentially weeks before the employees could have started to vote or even months before the voting period ended. *Cf., e.g., 2 Sisters Food Grp.*, 357 NLRB at 1818 (faulting employer for forcing employees to make an observable choice “on the day of the election”). Any coercive pressure that could conceivably have existed would have dissipated by the time employees started voting. What is more, Amazon employees are well accustomed to the distribution of work-related “swag” and “really don’t pay attention” to such giveaways. Tr. 418 (Bibbs); *see* Tr. 1563–64 (Jena Smith). And it is implausible that the effect of the availability of these limited items could have been significant enough to sway the election. Indeed, the lopsided electoral results here—where the Union lost 738–1,798 with 505 challenged ballots—provide a stark contrast to the cases where the Board has ordered a rerun election on such grounds. *See 2 Sisters Food Grp.*, 357 NLRB at 1816 (union lost 66–87; 24 challenged ballots); *Circuit City*, 324 NLRB at 147 (union lost 40–56; 4 challenged ballots); *Barton Nelson*, 318 NLRB at 712 (union lost 78–90; 8 challenged ballots); *Gonzales Packing*, 304 NLRB at 805 (union lost 52–59; 6 challenged ballots). Here, too, there is no evidence that any objectionable

¹⁵ What is more, the employees would have been wearing face masks and social distancing this whole time during the COVID-19 pandemic, making it even more unlikely that they would have reasonably felt that management was observing who took the “vote no” materials as they left the meetings. Like many employers, Amazon required employees to wear masks in the workplace during the pandemic, including the period when small group meetings were taking place. Tr. 368–39 (Craig); Tr. 796 (Jackson); Tr. 1549 (Jena Smith); Ex. J-4 at 23, 107.

conduct might have affected the election results to such an extreme extent that another election is warranted because of the placement of some pins and car tags on a table.

B. If the Region Orders a New Election, It Should Be a Manual Election.

While the Region should not order any new election and instead should certify the existing results, if it does order a rerun the second election should take place by manual, in-person voting. The grounds that the Region cited for ordering a mail-ballot election in January 2021 do not support the same direction today. Thanks to widespread vaccination, the risks of death and hospitalization posed by COVID-19 have dramatically receded since the start of this year. And, importantly, the turnout in the mail-ballot election at BHM1 this year shows that concerns about voter participation were not simply speculative. In January, the Regional Director determined that any disenfranchisement would best be addressed after the election and might even prove to be a non-issue because employees would not need to “enter the voting location” in person. D&DE 9. But voter participation was worse than feared, and lower than pre-pandemic mail-ballot levels. *See Aspirus*, 370 NLRB No. 45, slip op. at 2. And that was despite the substantial efforts of both the Union and Amazon to urge employees to vote. Especially since the 2,000 non-participating voters influenced the Hearing Officer’s recommendation, Report 24, the Region should not let history repeat itself. It should order a manual-ballot election under responsible safety protocols that will increase voter participation.

The January D&DE began by observing that several of the *Aspirus* conditions were not present, and that remains true. No regional office is operating under “mandatory telework” status today (condition 1). *Aspirus*, 370 NLRB No. 45, slip op. at 4–5; *see* D&DE 5. Nor is there a colorable claim that a manual election would run afoul of “mandatory state or local health

orders relating to maximum gathering size” (condition 3).¹⁶ *Aspirus*, 370 NLRB No. 45, slip op. at 6; see D&DE 5. And just as before, Amazon’s proposed precautions equal or “exceed those contemplated by GC Memo 20-10” (condition 4). D&DE 5; see *Aspirus*, 370 NLRB No. 45, slip op. at 7. Here, Amazon again proposes a single large tent near the main entrance and plexiglass booths, but configured in the identical manner as the tents in the Decision and Direction of Election in *Nissan North America*, Case 10-RC-273024 (June 11, 2021), a case where the Regional Director recently approved a manual election. See *id.* at 27, 30–31.

In the past D&DE, the Regional Director focused on *Aspirus* conditions 2 and 5. D&DE 5–10. Condition 2 may support a mail-ballot election when “[e]ither the 14-day trend in the number of new confirmed cases of Covid-19 in the county where the facility is located is increasing, or the 14-day testing positive rate in the county where the facility is located is 5 percent or higher.” *Aspirus*, 370 NLRB No. 45, slip op. at 5. Condition 5 obtains when “[t]here is a current Covid-19 outbreak at the facility or the employer refuses to disclose and certify its current status.” *Id.* at 7. In the Regional Director’s view, “the high and still-rising positivity rate in Jefferson County, and the undeniable presence of COVID-19 both inside and outside the Employer’s facility,” supported a mail-ballot election under *Aspirus*. D&DE 10. But neither factor justifies a second mail-ballot election here, particularly given vaccine availability.¹⁷

As for condition 2, the Regional Director last time relied on Centers for Disease Control

¹⁶ Outdoor events like a second BHM1 election are permissible under state and local law. Alabama’s emergency health order ended May 31, 2021. See <https://www.alabamapublichealth.gov/covid19> (last visited Aug. 16, 2021).

¹⁷ *Aspirus* condition 6 left open the possibility that a Regional Director might find “similarly compelling considerations” for ordering a mail-ballot election, but the Board’s decision makes clear that these considerations still would have to be “circumstances related to the Covid-19 pandemic.” 370 NLRB No. 45, slip op. at 7. Just as current COVID-19 conditions do not trigger any of the first five *Aspirus* conditions, neither do they satisfy condition 6. Indeed, as the February-March election showed, the considerations relevant to Board elections cut the other way: there will be (1) higher turnout; (2) no chance of late returned ballots resulting in hundreds of challenges, and (3) no chance of objections tied to a mail ballot election, of which there were many in the prior objections phase.

data showing a testing positivity rate for Jefferson County of over 17% as of January 11, 2021.

D&DE 6. As of today, the data shows a slightly higher positivity rate (19.79%) given the spread of the Delta variant, but this rate may decrease by the time the Regional Director issues a decision here.¹⁸ So, too, with the other part of condition 2—the 14-day trend in new cases. The D&DE measured the 14-day trend by calculating the average change in the daily number of the county’s new cases over a 14-day period. D&DE 6. Between December 28, 2020 and January 10, 2021, that calculation showed an average increase in the number of new cases of 12.77 per day. *Id.* As of this brief’s filing, the same calculation using the most recent 14 days’ data shows a decreasing average (-18.62), and overall new case numbers are lower than in January:¹⁹

<u>Date</u>	<u>Number of New Cases</u>	<u>Date</u>	<u>Number of New Cases</u>
January 10	502	August 14	0
January 9	785	August 13	582
January 8	786	August 12	470
January 7	792	August 11	464
January 6	687	August 10	522
January 5	995	August 9	678
January 4	337	August 8	0
January 3	391	August 7	429
January 2	563	August 6	375
January 1	719	August 5	514
December 31	663	August 4	416
December 30	990	August 3	506
December 29	705	August 2	218
December 28	336	August 1	242

In approaching *Aspirus* condition 2, it is also important to bear in mind the increasing prevalence of the highly effective COVID-19 vaccines. According to the Centers for Disease Control, “[t]he COVID-19 vaccines authorized in the United States are highly effective at

¹⁸ See <https://covid.cdc.gov/covid-data-tracker/#county-view> (last visited Aug. 16, 2021).

¹⁹ D&DE 6; see <https://bao.arcgis.com/covid-19/jhu/county/01073.html> (last visited Aug. 16, 2021).

preventing severe disease and death, including against the Delta variant.”²⁰ As of August 16, 2021, a majority (51.5%) of Jefferson County residents 18 years or older are fully vaccinated, and 66.7% of that population has received at least one dose—and 41.4% of all county residents are fully vaccinated.²¹ Given current data, there is no longer any basis to conclude that “safety needs dictate a mail-ballot election” in Jefferson County. *Aspirus*, 370 NLRB No. 45, slip op. at 5; cf. *Nissan N. Am.*, slip op. at 28 (pointing to a county-level vaccination rate “now exceed[ing] 35% of the population” as a reason for ordering a manual election).

The D&DE also rested on *Aspirus* condition 5: whether there is currently an outbreak at the employer’s facility. The D&DE found that “any presence of COVID-19 in an employer’s facility” counted “in favor of conducting a mail ballot election.” D&DE 5. But the Board has since rejected such reasoning. In *Rush University Medical Center*, a Regional Director similarly based a mail-ballot election on “a COVID-19 presence” at the facility, but the Board disagreed and reversed, clarifying that “the *Aspirus* current outbreak factor is not satisfied by evidence that Covid-19 is present at a facility.” 370 NLRB No. 115, slip op. at 1 (2021). This condition comes into play only when COVID-19 “cases at the facility would reasonably be expected to affect the conduct of a manual election.” *Id.* And the “[r]elevant considerations in this regard include whether (1) the number or physical location of such Covid-19 cases, or the likelihood that those cases will result in unit employees being exposed to Covid-19, indicates that a manual election would pose a threat to health or safety; or (2) current Covid-19 cases among unit employees would result in their disenfranchisement by a manual election.” *Id.* at 1–2.

These considerations cannot support a mail-ballot election. Over the 14 days between

²⁰ See <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html> (last visited Aug. 16, 2021).

²¹ See <https://covid.cdc.gov/covid-data-tracker/#county-view> (last visited Aug. 16, 2021).

July 30 and August 12, 2021, only 111 BHM1 employees reported confirmed or presumptive positive cases out of a total site population of more than 7,200 individuals.²² These figures are even lower than the January statistics, where 218 individuals had tested positive or self-reported confirmed or presumptive positive results. Supp. Stone Cert. ¶¶ 3–4. Thus, there is no basis to conclude that a manual election would pose a threat to health or safety—particularly when BHM1 employees are fully accustomed to in-person work and Amazon’s extraordinary COVID-19 safety protocols.

To increase the safety of a manual election, Amazon incorporates by reference the proposed manual election protocols contained in Attachment 2 of its January 7, 2021 post-hearing brief. Amazon modifies that proposal, however, to align with the concerns expressed in the D&DE regarding the use of certain equipment “clearly belonging” to Amazon. Accordingly, Amazon provides this following high-level summary:

- A single voting location—the outside parking lot adjacent to BHM1, with however many more locations as per the Region’s determination.
- Two voting periods per day—6:00 a.m. to 11:00 a.m. and 1:00 p.m. to 6:00 p.m., with a break from 11:00 a.m. to 12:30 p.m.
- Voting over a period of up to four days depending on how many Board agents are available to participate.
- Eligible voters could vote before or after their shifts, and Amazon consents to self-release employees to vote.
- Voting in a tent (or tents, with each tent of roughly these dimensions) covering approximately 3,600 square feet with the ability to increase or decrease the size of the area to fit the Region’s requirements. The tent would have heating and lighting and plexiglass booths, per the *Nissan North America* order. The Region would also be able to raise or lower the sides of the tent to increase the flow of fresh air in the area.
- Amazon would provide all health certifications, including those in GC 20-10, *Aspirus*, and GC 21-01, as requested by the Region before and after the election.

²² Amazon will provide a declaration with up-to-date statistics if the Region requests.

- Amazon would provide all necessary personal protective equipment (if requested or ordered by the Regional Director), such as gloves, eye protection, face masks, and hand sanitizer, to Board agents and observers.
- Employees would be provided with a disposable pencil upon entering the voting area.
- Hand sanitizer would be available throughout the voting line and tent.
- Any additional precautions ordered by the Regional Director.

As before, Amazon emphasizes that its proposed protocols are not intended to create the impression that it “controls employee access to the Board’s election processes.” *See Aspirus*, 370 NLRB No. 45, slip op. at 7. Amazon’s manual election proposal assumes that the Board will supply and use Board banner, signage, insignia, etc., so that all attendees understand that this is a Board election and not an Amazon event. Amazon will also agree to amendments or additions to the proposed protocols that the Board deems necessary.

C. If the Region Orders a New Mail-Ballot Election, It Should Give Amazon Clear Guidance on What to Do With the Existing Mailbox.

Finally, if the Region does order a mail-ballot rerun, it should at a minimum make explicit what Amazon is supposed to do with the mailbox that is now bolted to concrete outside the BHM1 entrance. If, as the Hearing Officer seemed to suggest, there is something irredeemably tainted either about this particular mailbox or about mailboxes on employers’ property more generally, the Region may expect Amazon to block off access to the mailbox during the voting period or remove it altogether. But the viability of that course of action is not so simple. The mailbox is not Amazon’s private property and, as a general rule, federal law prohibits anyone from obstructing the mail or destroying a mailbox. 18 U.S.C. §§ 1701, 1705. The Union might even argue that preventing access to the mailbox is an unfair labor practice under Section 8(a)(1) on the theory that it interferes with or restrains employees’ exercise of their Section 7 rights during the critical period. 29 U.S.C. § 8(a)(1). **For these reasons, if the**

Region expects Amazon to directly take action with the USPS-owned mailbox or ask the USPS to do so, it should say so clearly, and it should make clear what Amazon should do if the USPS does not agree with Amazon's request or the Board's desires. The conditions for an election at BHM1 must not be a moving target, and Amazon, as with the first election, does not want to take action with respect to the mailbox that post-election could provide the basis of a second round of objections should the Union lose again.

IV. CONDITIONAL REQUEST FOR EXTENSION OF TIME

In accordance with Section 102.69(c)(1)(iii) of the NLRB's Rules and Regulations, Amazon requests an extension of five additional business days, or until August 30, 2021, to file an answering brief if the Union chooses to file exceptions to the Hearing Officer's Report.

V. CONCLUSION

For all these reasons, the Region should reject the Hearing Officer's recommendation to sustain Union Objections 1–4, 6, 11, and 17; dismiss those objections; and certify the election results. If it does not, it should order that the rerun election be conducted by manual ballot. Failing that, the Region should clarify whether Amazon should have its current mailbox blocked, locked, or removed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Employer's Brief in Support of Its Exceptions to the Hearing Officer's Report on Objections was filed today, August 16, 2021, using the NLRB's e-Filing system and was served by email upon the following:

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